Supreme Court, U. S.
FILED
FEB 14 1980
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1080

DETROIT POLICE OFFICERS ASSOCIATION, et al.,

*Petitioners,*

v.

COLEMAN A. YOUNG, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

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### Opinions Below

The district court's opinion is reported at 446 F. Supp. 979, and the Sixth Circuit's opinion is reported at 608 F.2d 671. Both opinions are reprinted in the appendix to the petition.

### Statement of the Case

The plaintiffs, petitioners here, challenge the City of Detroit's affirmative action plan for the promotion of police officers to the rank of sergeant. The plan was adopted in 1974, after a long history of racial discrimination by the City in its police employment practices and after decades of hostility and violence—including the tragic race riots of

1943 and 1967—between the black community and the police. The plan provided that, subject to the continued availability of qualified officers of both races, and under the supervision and periodic review of the Board of Police Commissioners, approximately equal numbers of black and white officers would be promoted to the rank of sergeant.

The district court held that the plan violated, *inter alia,* the Fourteenth Amendment to the United States Constitution, Titles VI and VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. §§ 1981 and 1983. The district court entered a permanent injunction prohibiting the City from promoting police officers to the rank of sergeant pursuant to the affirmative action plan and forbidding the consideration of race as a factor in promotional decisions.

The Sixth Circuit reversed the judgment and remanded the case for the district court to reconsider the constitutional issues and, if it finds the affirmative action plan to be constitutional, to determine the reasonableness of the plan's 50/50 ratio and to establish a formula for the plan's eventual termination. The court of appeals held that, due to errors of law and an impermissibly restrictive view of the evidence, the district court had failed to give adequate consideration either to the extensive evidence of the police department's prior discrimination against blacks or to the City's substantial need to increase the numbers of black officers in all ranks in order to provide effective law enforcement to the people of Detroit. The Sixth Circuit reviewed the record in detail, dismissed the plaintiffs' claims under Title VI, Title VII, and § 1981, and remanded the remaining issues for determination by the district court.

## REASONS FOR DENYING THE WRIT

### I.

### No Questions Are Properly Presented For Review at This Time.

As a rule, this Court will not issue a writ of certiorari to review a nonfinal appellate decision which, like the Sixth Circuit's decision here, remands a case to the district court for a determination of critical facts. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam). The lack of finality "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Where, as here, there are critical factual and constitutional questions which have not been decided by either of the courts below, this Court should not review the case. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-84 n.24 (1979); *Sandstrom* v. *Montana*, 61 L.Ed. 2d 39, 53 (1979).[1]

There is no final decision in this case. Indeed, the Sixth Circuit has remanded the case to the district court for a determination which may resolve the dispute in petitioners' favor. It is clear from the district court's February 1978

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[1] The Court generally reviews interlocutory decisions only where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893), *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952), or where there is a straightforward issue of law—for example, a jurisdictional question—that is basic to the continued litigation of the case, see, e.g., *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949). Because these exceptional circumstances are not present in the instant case, the Court should follow its "nomal practice of denying interlocutory review." *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

opinion that it did not correctly anticipate or properly address the critical factual and legal questions which this Court subsequently identified in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), and *United Steelworkers* v. *Weber,* 61 L.Ed.2d 480 (1979). See Section II, *infra.*

After reviewing the conflict between the opinion of the district court in the instant case and the opinions of this Court in *Bakke* and *Weber,* the Sixth Circuit outlined the complex factual and legal questions to be decided by the district court in order properly to assess the constitutionality of Detroit's plan. The district court must now determine whether the plan was justified by the need to remedy past discrimination, 608 F.2d at 694-95 (A. 32a-33a), or by the need to provide effective law enforcement and to reduce racial tensions between the police and the black community, *id.* at 695-96 (A. 34a-36a). As the Sixth Circuit noted, this determination may involve a number of subsidiary questions:

> [W]hether appropriate findings were made by a public body "with competence to act in this area" . . . [;]
>
> * * *
>
> whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities" . . . ; whether any discrete group or individual is stigmatized; . . . whether use of race is reasonable in light of the objectives of the plan . . . ; . . . [and whether] no other approach offers a practical means of achieving the ends of the program in the foreseeable future. *Id.* at 694 (A. 32a-33a) (citations omitted).

If the district court finds that race-conscious affirmative action is constitutionally permissible in the circumstances presented here, then it must determine whether the plan's 50/50 ratio is reasonable and whether provisions for terminating the plan should be established by the court.[2] 608 F.2d at 696-98 (A. 36a-40a). The district court's consideration of these issues may require it to resolve such additional questions as "whether the affirmative action plan is 'substantially related' to the objectives of remediation of prior discrimination and improved law enforcement," and whether the plan achieves these objectives "without unnecessarily trammeling the interests of white candidates for promotion." *Id.* at 696 (A. 37a).

In sum, the decisions of the courts below do not provide an opportunity for full review by this Court of the critical factual and constitutional questions in this case. The proceedings in the district court on remand may resolve those questions in a manner which will be appropriate for review by this Court at a later time. However, until a final decision has been made below, review should be denied.

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[2] The City instituted the plan as a temporary measure. The Sixth Circuit stated that, as in this Court's approval of a similar plan in *Weber*, the remedial and temporary aspect of the plan was essential to its approval and that "[u]nless the parties are able to agree on provisions for termination of the plan . . . , this will be an ingredient of the final judgment." 608 F.2d at 698 (A. 40a).

## II.

### The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Circuits or of This Court.

The conflicts asserted by petitioners do not exist. The decision in *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), like the decision below, recognizes that "[s]tatistically, disparate impact can be shown in a variety of ways," including the use of applicant flow data, statistics showing the racial impact of selection procedures, and comparisons of an employer's minority hiring record with the minority population in a community's labor force. 593 F.2d at 990. In *Navajo Refining,* the court found that "the actual percentage of [minority persons] hired compares favorably with the percentages under any appropriate measure." *Id.* at 991.[3] Here the Sixth Circuit carefully considered a variety of appropriate measures, but the facts required it to reach the opposite conclusion: "Application of these benchmarks indicates a gross disparity between black employment in the Department and black representation in the city's labor market and general population." 608 F.2d at 688 (A. 20a).

Petitioners also contend that the decision below conflicts with a line of cases following *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975). Although some of these decisions disapprove judicial imposition of race-conscious numerical promotion relief in litigated

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[3] The court in *Navajo Refining* found that it could not consider hiring statistics for years prior to 1969 because in that year the defendant had acquired the refinery as a going concern from an unrelated owner. 593 F.2d at 991. No such limitation applies to the case at bar.

cases,[4] none of them holds or suggests that an employer may not voluntarily adopt such a plan to eliminate a manifest racial imbalance. As the Court noted in *United Steelworkers* v. *Weber, supra,* "since the . . . plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act." 61 L.Ed.2d at 487. Even if the issue were one of the court's power rather than the employer's prerogative, the great weight of authority supports the judicial imposition of numerical promotion relief to correct proven discrimination in promotions.[5]

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[4] In *Bridgeport Guardians* there was no finding of discrimination in promotions to justify the district court's imposition of numerical promotion relief. 482 F.2d at 1341. The decision of the panel in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir.), *rehearing en banc denied,* 531 F.2d 5 (1975), *cert. denied,* 429 U.S. 823 (1976), was followed by the author of the *Kirkland* opinion and by one other Second Circuit judge in *Chance* v. *Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977), but has been rejected by three Second Circuit judges as inconsistent with other decisions of the circuit, *Kirkland, supra,* 531 F.2d at 5-11 (Mansfield, Kaufman, and Oakes, JJ., dissenting from denial of rehearing en banc).

In *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977), the court reversed a promotional quota where none of the victims of discrimination could take advantage of it and there was no "compelling need" for it. 564 F.2d at 1091-92. But the Fourth Circuit has upheld such relief where it is appropriate. See *Sherrill* v. *J.P. Stevens & Co.,* 551 F.2d 308, 13 E.P.D. ¶ 11,422, at 6414 (4th Cir. 1977).

[5] See *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 21 F.E.P. Cases 1140, 1148-49 (8th Cir. 1980); *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 588 F.2d 235 (8th Cir. 1978), *cert. denied,* 99 S.Ct. 3096 (1979); *EEOC* v. *AT & T Co.,* 556 F.2d 167, 177 (3rd Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *United States* v. *City of Chicago,* 549 F.2d 415, 436-37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Sherrill* v. *J.P. Stevens & Co.,* 551 F.2d 308, 13 E.P.D. ¶ 11,422 at 6414 (4th Cir. 1977); *Watkins* v. *Scott Paper Co.,* 530 F.2d at 1159, 1194 (5th Cir. 1976); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 377 (8th Cir. 1973).

In citing *Uzzell* v. *Friday,* 591 F.2d 997 (4th Cir., Feb. 2, 1979) (en banc), petitioners have relied on an opinion which the Fourth Circuit has withdrawn because the case was argued before an improperly constituted en banc court. *Uzzell* v. *Friday,* No. 75-2276 (4th Cir., Nov. 9, 1979). Moreover, because the facts of *Uzzell* are plainly distinguishable from the facts here, there was never a conflict between the two decisions. The original panel in *Uzzell* found that racial classifications used by a state university to assure minority representation in student government and student courts were "without either reasonable basis or compelling interest", 547 F.2d 801, 804 (4th Cir. 1977). On reconsideration in light of this Court's decision in *Regents of the University of California* v. *Bakke, supra,* the improperly constituted en banc majority emphasized that the university had "failed to demonstrate that the accomplishment of the State's purpose necessitates its use of a suspect classification . . ." 591 F.2d at 1000. In the instant case, respondents submit, the evidence demonstrates that Detroit's affirmative action plan was necessary to remedy past discrimination in its police employment practices, that the plan properly removed the adverse impact from the police department's unvalidated promotional model, and that the plan served the City's compelling interest in overcoming the effects of past discrimination and providing effective police services to the people of Detroit. The Sixth Circuit has remanded the case for the district court to determine whether this evidence satisfies the requirements of *Bakke.*

Finally, the decision of the Sixth Circuit is fully consistent with the guidance provided by a majority of this Court in the *Bakke* and *Weber* cases. The Court in *Bakke* held under Title VI and the Fourteenth Amendment that "the State has a substantial interest that legitimately may be served by a properly devised [medical school] admissions

program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320 (Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.). Four Justices summarized the central meaning of the Court's opinions in the following way:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area. *Id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ.).

The Sixth Circuit correctly applied the opinions in *Bakke* to the facts of this case. See 608 F.2d at 694-95 (A. 32a-33a).[6]

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[6] Petitioners have noted that the Sixth Circuit did not expressly reverse the district court's holding that the examinations for sergeant which the City instituted in 1973 were job-related and nondiscriminatory. It was unnecessary for the appellate court to reach this question; it found that Detroit's plan was permissible under Title VI, Title VII, and § 1981—and may be found by the district court on remand to be permissible under the Fourteenth Amendment—even if the present promotional model could be shown to select the more qualified applicants. Moreover, the record demonstrates that the written test, a major portion of the model, was not job-related and, if used without an affirmative action adjustment, would have unlawfully excluded black officers from promotion. See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 435 (1975); *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 364 n.37 (Brennan, White, Marshall, and Blackmun, JJ.), 306 n.43 (Powell, J.). In a closely related case involving Detroit's affirmative action plan for the promotion of sergeants to the rank of lieutenant, Circuit Judge Keith, sitting by designation in the district court, has addressed this question at length and concluded that the written test is not job-related. *Baker* v. *City of Detroit,* Civil Action Nos. 5-71937, 5-72264, at 60 (E.D. Mich., Oct. 1, 1979). Judge Keith upheld the affirmative action plan "as proper under federal and state law . . . because it undoes years of discrimination[,] . . . because it serves vital City needs . . . [and] because it looks to the future as a means of remedying a sorry past." *Id.* at 108-109 (footnote omitted).

The Sixth Circuit also correctly applied this Court's decision in *Weber*. See 608 F.2d at 689-91 (A. 23a-26a). Here, as in *Weber*, the plan is "designed to break down old patterns of racial segregation and hierarchy"; it "does not unnecessarily trammel the interests of the white employees"; and it "is a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 61 L.Ed.2d at 492. The Sixth Circuit, concluding that the federal regulation imposed by Title VII on affirmative action by state and local governments is no more stringent than that imposed on private industry, accordingly upheld Detroit's plan. The statutory language,[7] the legislative history,[8] and the constitutional underpinnings[9] of Title VII demonstrate that the Sixth Circuit was correct in rejecting a double standard.

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[7] Section 703(a), (j), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), (j).

[8] See *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 353-54 n.28 (Brennan, White, Marshall, and Blackmun, JJ.).

[9] See *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 (1966); *National League of Cities* v. *Usery,* 426 U.S. 833, 851 (1976).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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